In The

# SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 382

O. Z. EVERS, et al,
Appellants,

vs.

JOHN T. DWYER, et al,
Appellees.

Appeal from the United States District Court for the Western District of Tennessee, Western Division

## MOTION TO DISMISS


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The Daily News, Memphis, Tenn., 10/13/58—60c.

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## MOTION TO DISMISS

The appellees, pursuant to United States Supreme Court Rule 16, file this motion to dismiss on the ground that the appeal does not properly lie to this Honorable Court, and on the further ground that an appeal in this case has been docketed in the United States Court of Appeals for the Sixth Circuit. (Tr. 40).

### Opinion Below

The opinion of the District Court has not yet been reported, but a true copy thereof appears as Appendix I to the statement as to jurisdiction filed herein by the appellant.

### Jurisdiction

Although appellant seeks to invoke jurisdiction under the sections set forth in statement as to jurisdiction, it appears quite evident from said statement that appellant is not satisfied that this Court, in fact, has jurisdiction of this appeal.

The opinion and order of the Three Judge District Court (Tr. 29-35) clearly show that no order was entered granting or denying an interlocutory or permanent injunction as required by 28 U.S.C. Sec. 1253.

### Statute Involved

Sections 1704-1709, Title 65, Tennessee Code Annotated, which sections are set forth as Appendix II to the statement of jurisdiction.

### Question Presented

Question presented is whether the action of the Three Judge District Court was correct in that plaintiff's (appellant's) action was dismissed for lack of an actual controversy and of a real interest in the suit on the part of said plaintiff.

### Statement of Facts

The complaint is predicated on the basic proposition that plaintiff (appellant) has on numerous occasions been compelled to occupy segregated sections of buses owned and operated by the Memphis Street Railway Company in Memphis, Tennessee, and the implication of the allegations of said complaint is that plaintiff (appellant) at the time of the suit and in the future will be deprived of his civil rights. (Tr. 1, 5, 6).

The testimony of the plaintiff (appellant) was, however, (a) that he had never ridden on a bus in Memphis, Tennessee, before the one incident described in the complaint, (Tr. 117); (b) that he had never ridden on a bus in Memphis, Tennessee, since the incident described in the complaint, (Ibid); (c) that he owned an automobile, (Ibid); (d) that on the date of the incident described in the com-

plaint he was proceeding from his home in East Memphis to the main Post Office in down town Memphis, where he was employed, (Tr. 101); (e) that the bus which he boarded at the time of the incident was proceeding in a different direction on a circuitous route which required several miles extra travel to reach the down town area, (Tr. 95-96); (f) that the plaintiff (appellant) is not in the position of being representative of a class of colored citizens who do use the buses in Memphis as a means of transportation; (g) that he boarded the bus for the sole purpose of creating disorder, and a basis for this litigation.

**Argument**

On the undisputed testimony and the findings of the District Court, this case does not present an actual controversy for decision by this Court. The question of the constitutionality of the statute was not determined by the District Court, and the proper appeal tribunal is the United States Circuit Court of Appeals where this cause has been docketed and where it will be heard on call.

The opinion of the Three Judge District Court in substance states that in the absence of a showing of an actual controversy, and that appellant is being deprived of his constitutional right, no citizen should be privileged to obtain from the Federal Court a judgment which not only declares invalid the statutory law of a sovereign state, but also enjoins its enforcement . . . (Tr. 34).

For the purpose of avoiding repetition, appellees adopt the opinion of the District Court as sound and as determinative of the question of jurisdiction. There is, we believe, an analogy between the language of the Three Judge District Court herein above referred to, and the language contained in the case of *Wilentz et al vs. Sovereign*

*Camp, Woodmen of the World*, 306 U.S. p. 573 (582). "The extraordinary procedure before a court of three judges, designed for a specific class of cases sharply defined by the statute, cannot properly be extended to cases in which there is no substantial basis for relief by injunction restraining the action of state officers in enforcing or carrying into effect a challenged state statute of general application."

## Conclusion

Respectfully, the appeal to this Court should be dismissed.

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October 14th, 1958.

**Certificate of Service**

I, Charles M. Crump, attorney herein and a member of the bar of the Supreme Court of the United States, do hereby certify that I have served upon counsel of record for the appellants a copy of the foregoing motion to dismiss by depositing true and correct copies thereof in the United States mail, first class postage prepaid, on October 16th, 1958, addressed as follows:

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# SUPREME COURT OF THE UNITED STATES

No. 382.—October Term, 1958.

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| O. Z. Evers, et al., Appellants, v. John T. Dwyer, et al. | On Appeal From the United States District Court for the Western District of Tennessee. |

[December 15, 1958.]

Per Curiam.

Appellant, a Negro resident of Memphis, Tennessee, brought this class action in the Western Division of the United States District Court for the Western District of Tennessee, seeking a declaration as to his claimed constitutional right, and that of others similarly situated, to travel on buses within that city without being subjected, as required by Tenn. Code Ann., Title 65, §§ 1704–1709 (1955), to segregated seating arrangements on account of race. An injunction against enforcement of this statute or any other method of state-enforced segregation on Memphis transportation facilities was also sought. Various officials and officers of the City of Memphis, the Memphis Street Railway Company, and one of that Company's employees were named as defendants. After a hearing a three-judge District Court, without reaching the merits, dismissed the complaint on the ground that no "actual controversy" within the intendment of the Declaratory Judgment Act, 28 U. S. C. § 2201, had been shown, in that appellant had ridden a bus in Memphis on only one occasion and had "boarded the bus for the purpose of instituting this litigation," and was thus not "representative of a class of colored citizens who do use the buses in Memphis as a means of transportation."

Of course, the federal courts will not grant declaratory relief in instances where the record does not disclose an

"actual controversy." *Public Service Comm'n* v. *Wycoff Co.*, 344 U. S. 237. In *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273, this Court said: "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." In the present case we think that the record establishes the existence of an actual controversy which should have been adjudicated by the lower court.

The District Court found that when appellant boarded a Memphis bus on April 26, 1956, and seated himself at the front of the vehicle, the driver told him he must move to the rear, "stating that the law required it because of [his] color;" that following appellant's refusal to comply, two police officers shortly thereafter boarded the bus and "ordered [appellant] to go to the back of the bus, get off, or be arrested;" and that thereupon appellant left the bus. The record further shows that the appellees intend to enforce this state statute until its unconstitutionality has been finally adjudicated. We do not believe that appellant, in order to demonstrate the existence of an "actual controversy" over the validity of the statute here challenged, was bound to continue to ride the Memphis buses at the risk of arrest if he refused to seat himself in the space in such vehicles assigned to colored passengers. A resident of a municipality who cannot use transportation facilities therein without being subjected by statute to special disabilities necessarily has, we think, a substantial, immediate, and real interest in the validity of the

statute which imposes the disability. See *Gayle* v. *Browder*, 352 U. S. 903, affirming the decision of a three-judge District Court reported at 142 F. Supp. 707. That the appellant may have boarded this particular bus for the purpose of instituting this litigation is not significant. See *Young* v. *Higbee Co.*, 324 U. S. 204, 214; *Doremus* v. *Board of Education*, 342 U. S. 429, 434–435.

We hold that the court below erred in not proceeding to the merits. Accordingly, the judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*